The first question concerning limitation is one of law — when did the defendant's right of action accrue?

I have studied the cases cited by Mr. Wilson on limitation, and in particular a Privy Council decision, *Bolo* v. *Koklan*;[6] one decision of this court's predecessor (namely, the Court of Appeal) in *Ponnusamy & Another* v. *Nathu Ram*;[2] and two decisions of this court, *Ng Moh* v. *Tan Bok Kim & Another*[4] and *Nasri* v. *Mesah*;[3] and I am satisfied that the defendant's right of action accrued not from the date of the sales but from the time when the defendant asserted her right and it was infringed by Merah or the plaintiff or from the time when there was a clear and unequivocal threat by Merah or the plaintiff to infringe that right.

The next question concerning limitation that arises is one of fact — when did the first clear and unequivocal threat by Merah or the plaintiff of the defendant's right occur? If it occurred more than twelve years before the date of the counterclaim, then the counterclaim is statute-barred. As to this, it should be borne in mind that the onus is not on the defendant but on the plaintiff to prove that the threat took place more than twelve years before the date of the counterclaim.

The evidence produced by the plaintiff is as follows. Hussin, the plaintiff's father and the original plaintiff's son, said that after Merah's death Awang Senik (the original plaintiff) tried to collect rents from the three lots concerned, but the defendant refused to allow him to do so. Mek Som, Awang Senik's widow, gave evidence to the same effect.

The evidence produced by the defendant is as follows. The defendant herself said that Merah died in 1956, and that she did not take action to get the lots formally transferred to her because when she saw him on two occasions he was sick and that she trusted him because he was her uncle. In cross-examination she said that she first asked Merah to transfer the lands over a month after her grandmother Mentosa's death, and that she asked him on the second occasion a month later, and that he was sick on both occasions.

It is not disputed that Merah died in December 1956. If his refusal to transfer to the defendant may be interpreted as an infringement of the defendant's right, then it may be said that her counterclaim (dated 19th May, 1971) was statute-barred, having been made 12 years later.

But I do not think that it can be so interpreted, because when Merah failed to transfer to the defendant he did not deny her right.

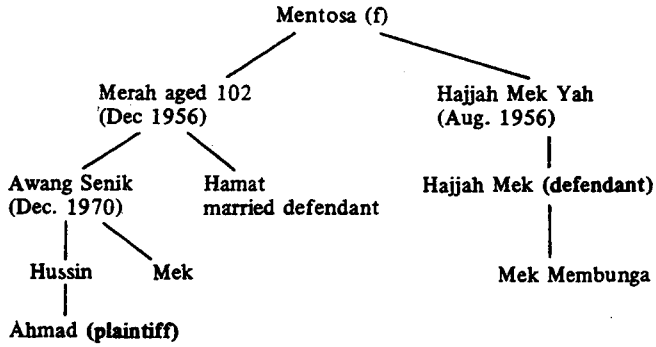
Hussin's and Mek Som's evidence that after Merah's death Awang Senik tried to collect the rents from the three lots concerned but that the defendant refused to allow Awang Senik to do so, showed on the contrary that was the first time that there was a clear and unequivocal threat by the original plaintiff to infringe the defendant's right. But it is to be observed that the evidence produced on behalf of the plaintiff was not specific as to the time when this threat to the defendant's right from the original plaintiff first occurred. All it said was that it occurred after Merah's death. It could have occurred in 1957, or at any time between that year and the filing of this suit. In view of this, in my judgment the learned judge was entitled to hold that the defendant's counterclaim was not statute-barred, since the plaintiff has not discharged the onus of proving that it was.

I would therefore dismiss this appeal with costs here and below.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed

APPENDIX



Note: Dates are dates of death.

Solicitors: *Wilson & Co.; Wan Mustapha & Co.*

LING HENG TOH CO. v. BORNEO DEVELOPMENT CORPN. SDN. BHD.

[F.C. (Azmi L.P., Ismail Khan C.J. Borneo and Ali F.J.) August 30, 1972]

[Kuching — Federal Court Civil Appeal No. 106 of 1971]

Contract — Building contract — Payment on interim certificate — Whether payment can be demanded without certificate.

The appellants had entered into a contract with the respondents for the construction of a wharf and river wall in Sarawak. It was agreed that payment for the work actually carried out would be made monthly against the certificate of the engineer. During the progress of the work, three interim certificates had been issued by the engineers and paid by the respondents. The dispute in this case related to the fourth interim certificate. The appellants had asked the engineers for a fourth interim certificate for $35,415.89 but the engineers issued a certificate for the sum of $18,161.61 only. The appellants after some correspondence brought an action against the defendants for the balance of $17,254.27. It was alleged *inter alia* in the statement of claim that the engineers had not acted impartially and independently between the parties and had wrongly certified that only $18,161.61 was due. The learned trial judge dismissed the action and the appellants appealed.

Held: as the trial judge had found that there was no fraud or collusion between the respondents and the engineers and that the respondents had not interfered with or obstructed the engineers in issuing the certificate nor had they given instructions which impeded the engineers in the issue of the certificate, the appellants had failed to show that they could proceed in the action without a certificate.

Cases referred to:-

(1) *Engleshen* v. *McMaster* [1920] All E.R. Rep. 674 at pp. 676, 678.

(2) *R.B. Burden Ltd.* v. *Sumsea Corporation* [1957] 1 W.L.R. 1167 at pp. 1175, 1181.

FEDERAL COURT.

Ting Tung Ming for the appellants.

Sim Teck Kim for the respondents.

Ismail Khan C.J. (Borneo): In June 1968, the plaintiffs, a firm of builders, entered into a contract with the defendants, the Borneo Development Corporation Sdn. Bhd., for the construction of a wharf and river wall at Sungei Antu Industrial Estate, Sibu, Sarawak, on the terms set out therein. The material clause is clause 4(1) of Part II (payment) which reads: -

"(1) Payment for the work actually carried out will be made monthly against the certificate of the Engineer, each interim certificate will be paid less a retention of ten percent which will be retained until all work has been completed to the satisfaction of the Engineer and completed documental records delivered to him. When the work has been so completed and documents delivered the Engineer will certify the amount of the final contract price which will be paid to the contractor less the total of the amounts paid to him against interim certicates, also less 10% retention until such time as the work has been finally inspected at the end of the twelve months maintenance period."

There are sub-clauses relating to the amount of the retention money, the minimum amount payable on each interim certificate, and the time within which such payment is to be made by the defendants.

Clause 66 of Part I provides, *inter alia*, for the settlement of any dispute or difference of any kind whatsoever by means of arbitration.

Messrs Vallentine Laurie and Davies were the engineers employed by the defendants.

During the progress of work, three interim certificates for payment were issued by the engineers. The sums certified for payment were paid by the defendants to the plaintiffs. The controversy between the plaintiffs and the defendants concerns the fourth interim certificate.

On the 1st of April 1969, the plaintiffs wrote to the engineers for the fourth interim certificate for the nett sum of $35,415.89 cents. The engineers issued a certificate for the sum of $18,161.61 cents only, which the defendants paid. Then followed some correspondence between the plaintiffs and the engineers as to the balance. The engineers, however, stood by their certification. The plaintiffs then wrote to the defendants asking for this balance. The defendants replied that as far as they could see "the consulting engineers certified payment in accordance with the agreement". They suggested to the plaintiffs that they could make a fifth progressive claim. The plaintiffs did not act on this suggestion but commenced an action against the defendants for the sum of $17,254.27 cents.

It was alleged, *inter alia*, in the statement of claim that the engineers had not acted impartially and independently between the plaintiffs and the defendants and had wrongly certified that only $18,161.61 cents was due.

Briefly, the particulars of the default attributed to the engineers are that they had failed to exercise their own judgment as to whether the work had been carried out according to the contract and that they had taken extraneous matters into account in issuing their certificate, viz. all alleged statement by the plaintiffs' manager that the plaintiffs could withdraw from the undertaking.

It was alleged that the defendants were aware of such default and had expressly or impliedly sanctioned it.

The defendants denied these allegations. They also pleaded that the action was incompetent as the condition precedent was not performed in that there was no certificate for payment from the engineers. There was no reply to this plea. The allegations in the statement of claim were presumably made in anticipation of this plea to show that the defendants could not rely on the condition precedent.

The learned judge dismissed the action holding that the condition precedent had not been performed. From this decision the plaintiffs appealed.

It would have been helpful and would have made for an early disposal of the case if, as in the case of *Eaglesham* v. *McMaster*,(1) an application had been made to a judge in chambers to decide the point of law raised by the plea before the question of the amount due was dealt with.

As it was, a lot of evidence was led which had little bearing on the question of whether the defendants could rely on their plea as to the absence of the certificate. Clause 60 makes it clear that a certificate is a condition precedent to action.

In this appeal, the question for decision is whether the action is maintainable without a certificate. To succeed, the plaintiffs, bearing in mind that they are restricted to their pleadings, have to prove the circumstances that would warrant the court in interfering despite the absence of the certificate. They have to prove fraud or collusion between the defendants and the engineers or some improper conduct on the part of the defendants in respect of the certificate.

I do not find it necessary to go into the question whether in issuing the interim certificate the engineers were acting as *quasi* arbitrators with the obligation to act impartially or whether they were acting in the interest of the defendants, their employers.

The fact that the fourth interim certificate, through a misjudgment on the part of the engineers, had resulted in a smaller sum alleged to be due is irrelevant. In the case of *Englesham* v. *McMaster*(1) it was said by the Eral of Reading C.J. that —

"... The mere fact that the architect may have been guilty of an error of judgment by not applying his mind sufficiently to the question raised, or that he gave a wrong judgment, is immaterial for this purpose. The court cannot consider such matters unless the plaintiff has shown a ground for attacking the defendant with regard to the architect's certificate, and that is where the plaintiff fails. In *Hickman & Co. vs. Roberts* ([1913] A.C. 229), it was said that where improper conduct was shown — for example, if the architect was acting in the interests of one party by his direction — that would render his acts invalid. If, in this case, it had been shown that the defendants had given instructions to the architect as to the amount for which he should certify, or as to the decision at which he ought to arrive on any particular matter, there

would be sufficient to override the necessity for obtaining the certificate. . ."

In the instant case, there is not a scrap of evidence of any act on the part of the defendants to show that they had obstructed or intermeddled in any way in the matter of the fourth interim certificate. The only evidence of any act on the part of the defendants is their letter of the 25th July 1969 in reply to plaintiffs' solicitor's letter of the 22nd July 1969 which says:

"We refer to your JCCT/56/69 of 22nd July and are surprised at the contents as so far as we can see our Consulting Engineers have certified payment in accordance with the agreement. I suggest that before you decide to take the action referred to in your last paragraph which incidentally does not appear to be in accordance with our agreement, that your clients submit their 5th progress claim to our Consulting Engineers which will appear to me to be next action he should take."

It would be a misuse of language, to use the words of Lord Radcliffe in the case of *R.B. Burden Ltd.* v. *Swansea Corporation*,(2) to say this letter of the defendants constitutes an interference or obstruction of the issue of the certificate. In my view, all the defendants did was to point out that they had left the matter of the certificate to the engineers alone and that was according to the contract. They suggested that the plaintiffs could make a further progressive claim.

Interim certificates can only be an approximate valuation of the work done, and any errors in them are subject to adjustment when the final certificate is issued.

In the above case the defendant corporation had, at the request of the architect, appointed a surveyor to make valuations in connection with a building contract. The contractors had applied for an interim payment of £5785. The surveyor recommended £1287. The valuation which was not properly made, the surveyor declined to change. The contractors determined the contract on the ground that the action of the surveyor amounted to interference or obstruction by the defendants of the issue of a certificate. Lord Tucker said —

". . .Nor do I think that the conduct found against Mr. Hawkins (the surveyor) obstructed the issue of a certificate; it may have resulted in the issue of a certificate for a smaller sum than that which was due, but that is, in my view, a matter for arbitration. . . ."

In the instant case, the contract provides for arbitration.

The learned judge found that there was no fraud or collusion between the defendants and the engineers; the defendants did not interfere or obstruct the engineers in issuing the fourth interim certificate nor had they given instructions which impeded the engineers in the issue of such certificate.

On the evidence there is no other finding that he could have arrived at. The plaintiffs had failed to show that they could proceed in the action without a certificate.

The appeal is dismissed with costs.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed.

GUAN SOON TIN MINING CO. v. AMPANG ESTATE LTD.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)

September 11, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1972]

Land Laws — Right of support — Land in its natural state, by the adjacent land — National Land Code, s. 44(1)(b).

Mining — Adjacent land — Damage to neighbour's property — Mining Enactment (Cap. 147), ss. 16(vi) & 134.

Common law principles apply to claims for disturbance of the right to support. When a subsidence occurs to a neighbour's land, he who causes the subsidence is liable in damages. Where there is a lapse of time between the excavation of land and the occurrence of the resulting subsidence and during the interval a change has taken place in the ownership or occupation of the land, the new occupier is under no liability.

This was an appeal from the decision of the High Court ([1972] 1 M.L.J. 131). The respondent were owners of certain lands which they have developed as a housing estate. The appellants were miners holding a lease over land lying south of the respondents' property. A minor landslide occurred on the appellants' land on December 29, 1966 due to heavy rain and caused damage to the respondents' property. A further slip occurred in February 1967 and others subsequently. The respondent issued a writ on May 21, 1968 for damages claiming the sum of $501,991.29 for the damage caused to their property.

In the court below the question for determination was whether the appellants were under a legal obligation to support the respondents' land according to common law principles which have been given statutory recognition by section 44(1)(b) of the National Land Code and various provisions of the Mining Enactment, especially sections 16(vi) and 134; and if they were, whether the presence of a concrete drain on the respondents' land disentitled them to this right of support.

The respondents sought to prove (i) that the appellants carried on mining on the adjacent land, and (ii) that "by reason of such working" the appellants had suffered damage to this property.

The appellants did not dispute the damage, but they denied liability therefor. The trial judge found them liable.

Held, allowing the appeal: it was proved that, adjoining the respondents' land at its southern boundary, other miners had worked this mining land for many years. The land had already been excavated previously when the appellants entered into occupation. There was no evidence that the appellants enlarged or deepened this hole or committed any other act which would make them liable for withdrawal of support from the respondent's land.

Cases referred to:-

(1) *Torette House Pty. Ltd.* v. *Berkman* 62 C.L.R. 637, 658.

(2) *Lamb* v. *Walker* L.R. 3 Q.B.D. 389, 400.

(3) *Backhouse* v. *Bonomi* 9 H.L.C. 503.

(4) *Greenwell* v. *Low Beechburn Coal Co.* [1897] 2 Q.B. 165.

(5) *Hall* v. *Duke of Norfolk* [1900] 2 Ch. 493.

(6) *Byrne* v. *Judd* (1908) 27 N.Z.L.R. 1106.

(7) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 93.

(8) *Gray* v. *Lord Ashburton* [1917] A.C. 26.

FEDERAL COURT.

Edgar Joseph Jr. for the appellants.

S.D.K. Peddie for the respondents.

Ong C.J. (Malaya): The respondents are the owners of certain lands situate off Jalan Ampang, Kuala Lumpur, which they have developed as a housing estate. The appellants were miners holding a lease over some 25 acres of land lying south of the respondents' property.